

BEFORE THE HEARING EXAMINER
FOR THE CITY OF ISSAQUAH

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DEC 19 2014

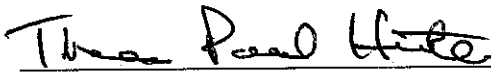
City of Issaquah

In the Matter of the Appeals of)	No. HEA-2014-02
)	No. ASDP13-00001
Bass & Bass Partnership)	No. SHO13-00007
)	
)	North Issaquah Roadway Network
)	Improvements
)	
Of an Administrative Site Development)	
Permit, a Substantial Development Permit,)	RESPONSE TO APPELLANT NOTICE
<u>and a SEPA Threshold Determination</u>)	

TO: ALL PARTIES

PLEASE TAKE NOTICE, that the undersigned Hearing Examiner, having the responsibility to decide all appeals before him, has on this day forwarded a decision on this appeal to the City. Under IMC 18.04.240, the City has the responsibility for mailing the Notice of Decision to the parties.

DATED this 18th day of December 2014.


THEODORE PAUL HUNTER
Hearing Examiner
Sound Law Center

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City of Issaquah

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FOR THE CITY OF ISSAQUAH

In the Matter of the Appeals of)	No. HEA-2014-02
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Bass & Bass Partnership)	No. SHO13-00007
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)	North Issaquah Roadway Network
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Of an Administrative Site Development)	
Permit, a Substantial Development Permit,)	FINDINGS, CONCLUSIONS, AND
<u>and a SEPA Threshold Determination</u>)	DECISION

SUMMARY OF DECISION¹

Bass & Bass Partnership's appeal of the Administrative Site Development Permit (ASDP 13-00001), Shoreline Substantial Development Permit (SHO13-00007), and SEPA Mitigated Determination of Nonsignificance for the North Issaquah Roadway Network Improvements project is **DENIED**. Substantial evidence supports the conclusion that the City properly considered the environmental impacts of the proposal—including impacts to the built environment—and did not commit clear error in issuing the Administrative Site Development Permit (ASDP), Shoreline Substantial Development Permit (SSDP) and Mitigated Determination of Nonsignificance (MDNS). Additionally, substantial evidence supports the conclusion that the North Issaquah Roadway Network Improvements (NIRNI) project is independent from other proposed projects in the area. Accordingly, the City did not commit clear error in issuing a separate SEPA determination for the NIRNI project. Finally, the City did not commit clear error in designating Senior Environmental Planner Peter Rosen with authority to issue final decisions on the ASDP and SSDP permits.

SUMMARY OF PROCEEDINGS

Hearing Date:

The Hearing Examiner held an open record hearing on the appeal on November 21, 2014. The parties agreed that a decision could be issued by December 22, 2014.

Testimony:

The following individuals presented testimony under oath at the open record hearing:

Appellant Witness:

Christopher Brown, P.E.

David Cole, P.E.

Douglas Stalder

¹ The Hearing Examiner decides the Appellant's appeals of the Site Work Permit (SW14-00037) and SEPA MDNS for the East Lake Sammamish Parkway Widening project in a companion decision.

Findings, Conclusions and Decision

City of Issaquah Hearing Examiner

Bass & Bass Partnership Appeal of North Issaquah Improvements

No. HEA-2014-02; ASDP13-00001; No. SHO13-00007

Christian Azizeh

City Witnesses:

Sheldon Lynne, Public Works Engineering Director

Kerry Ritland, Surface Water Manager

Peter Rosen, Senior Environmental Planner, SEPA Responsible Official

Attorneys Bill Williamson represented the Appellant

Attorney Bio Park represented the City.

Exhibits:

The following exhibits were admitted into the record:

Appellant Exhibits

- A-1. Shoreline Permit Application (SHO13-00007), received March 29, 2013
- A-2. Land Use Permit Application for Administrative Site Development Permit (ASDP13-00001), dated January 7, 2013
- A-3. Notice of Decision for ASDP13-00001 and SHO13-00007, dated September 23, 2014
- A-4. Elements of Site Development Permit Process, undated
- A-5. Environmental Checklist and Mitigated Determination of Non-Significance, dated August 6, 2014
- A-6. Preliminary Costco Development Agenda Record – AB 6780, dated October 13, 2014
- A-7. Assessment of Site Impacts, Christopher Brown, dated August 5, 2014
- A-8. Assessment of Site impacts, Christopher Brown, dated June 30, 2014
- A-9. North Issaquah LID Roadway Project Color Project Plan Sheets, dated July 24, 2012
- A-10. Gray & Osborne (City) Preliminary ELSP/62nd Street Improvements, dated January 2014
- A-11. Concept Engineering Channelization & Driveway Modification Sheet, dated February 13, 2014
- A-12. Addendum to SEPA Determination, dated July 17, 2014
- A-13. North Issaquah Local Improvement District Transportation Analysis, dated October 2012
- A-14. Bass Appeal Statement before City's Hearing Examiner, with attachments, dated August 20, 2014
- A-15. Bass Appeal Statement before the City's Hearing Examiner, with attachments, dated July 25, 2014
- A-16. Bass Appeal Statement Before the City's Hearing Examiner, dated July 2, 2014
- A-17. Issaquah Street Standards (Transportation), dated October 15, 2010
- A-18. Excerpts from City Council Regular Meeting Agenda for October 20, 2014
- A-19. Site Photograph, undated
- A-20. Site Photograph, undated
- A-21. Excerpt from Exhibit A-6, detailing approved projects for the North Issaquah Roadway Network, undated
- A-22. Vicinity Map for Local Improvement District 25, dated June 2012
- A-23. Preliminary Plan for East Lake Sammamish Parkway SE improvements, dated

Findings, Conclusions and Decision

City of Issaquah Hearing Examiner

Bass & Bass Partnership Appeal of North Issaquah Improvements

No. HEA-2014-02; ASDP13-00001; No. SHO13-00007

January 2014

- A-24. Copy of check from Williamson Law Office to City, dated October 6, 2014
- A-25. Resume for Christopher Brown, P.E., undated
- A-26. Resume for David Cole, P.E., undated
- A-27. Binder of "Filed SEPA MDNS & Underlying Permit Appeals," undated
- A-28. Copy of check from Williamson Law Office to City, dated October 6, 2014
- A-29. Business Banking Statement for Williamson Law Office, dated October 31, 2014

City Exhibits

- C-1. Utilities Application, dated June 12, 2014
- C-2. East Lake Sammamish Parkway SE Improvements Plans, dated January 22, 2014 (Cover, Sheets 1 to 61)
- C-3. East Lake Sammamish Parkway Improvements SEPA Checklist, dated June 10, 2014; with Vicinity Map, Project Area Map, and Floodplains and Hazardous Sites Map (Figures 1 to 3)
- C-4. Critical Areas Report and Conceptual Mitigation Plan, revised April 2014
- C-5. Endangered Species Act Stormwater Design Checklist, dated March 2014
- C-6. Final Cultural Resources Assessment, dated June 2014
- C-7. Memorandum from Ikuno Masterson, RE: East Lake Sammamish Parkway Traffic Report Summary, dated March 1, 2014
- C-8. East Lake Sammamish Parkway SEPA MDNS, dated June 18, 2014
- C-9. East Lake Sammamish Parkway SEPA MDNS Addendum, dated July 17, 2014
- C-10. Land Use Permit Application for Administrative Site Development Permit (ASDP13-00001), dated January 7, 2013; Shoreline Permit Application (SHO13-00007), received March 29, 2013
- C-11. Notice of Application and Notice of Public Meeting to adjacent property owners for ASDP13-00001 and SHO13-00007, dated April 26, 2013; Affidavit of Mailing, dated April 26, 2013.
- C-12. Legal notice in *The Issaquah Press* for the Public Meeting associated with SHO13-0007 and ASDP13-00001, dated May 1, 2013.
- C-13. Public Meeting Minutes, dated May 21, 2013
- C-14. Plans (30% design drawings; 13 sheets), updated December 31, 2012
- C-15. Cover sheet for SEPA Checklist and supporting technical studies, undated
- C-16. SEPA Environmental Checklist, dated December 2012
- C-17. Geotechnical Report, North Issaquah LID Proposed Bridge, PanGEO, Inc. (Appendix A of SEPA Checklist), dated August 2012
- C-18. Draft Geotechnical Report, North Issaquah Roadway Improvements, PanGEO, Inc. (Appendix B of SEPA Checklist), dated September 14, 2012
- C-19. Critical Areas Report and Conceptual Mitigation Plan, (Appendix C of SEPA Checklist), dated October 2012
- C-20. Cultural Resources Memorandum, ESA Paragon, (Appendix D of SEPA Checklist), dated May 30, 2012

Findings, Conclusions and Decision

City of Issaquah Hearing Examiner

Bass & Bass Partnership Appeal of North Issaquah Improvements

No. HEA-2014-02; ASDP13-00001; No. SHO13-00007

- C-21. Transportation Operation Analysis, Transportation Solutions, Inc., (Appendix E of SEPA Checklist), dated October 2012
- C-22. SE 62nd St/4th Ave NW Roundabout Memo, Design Operations Analysis, dated October 2012
- C-23. 12th Ave NW Alternative Improvements Memo, dated September 5, 2012
- C-24. Detailed Level of Service (LOS) Tables, dated October 2012
- C-25. SEPA Determination for North Issaquah Roadway Network Improvements (ASDP13-0001/SHO13-00007), dated August 6, 2014
- C-26. Notice of Decision for ASDP13-0001 and SHO13-00007, dated September 23, 2014
- C-27. City of Issaquah Street Standards, dated October 15, 2010
- C-28. Site Impacts Assessment, Christopher Brown, dated August 5, 2014
- C-29. Declaration of Charlie Bush, dated November 20, 2014
- C-30. Blank SEPA Checklist form, dated May 2014
- C-31. Aerial of East Lake Sammamish Parkway Improvement, undated
- C-32. Aerial of SE 62nd Street, undated

Pleadings, Appeals, Briefs, Notices and Orders

- Bass Partnership Combined Comments & Appeal Statement, MDNS issued June 18, 2014 for No. SW14-00037, SHO13-00007, and ASDP13-00001, dated July 3, 2014 (Exhibit A-16)
- Bass Partnership Supplemental Comments & Amended Appeal Statement, MDNS addendum issued July 17, 2014, for No. SW14-00037, SHO13-00007, and ASDP13-00001, dated July 25, 2014 (Exhibit A-15)
- Bass Partnership Appeal Statement of SEPA Threshold Determination (MDNS issued August 6, 2014) for No. SW14-00037, SHO13-00007, and ASDP13-00001, dated August 20, 2014, with Attachments A-C
- Supplemental Bass Partnership Appeal Statement, dated October 6, 2014, with Attachments A-C
- Hearing Examiner Pre-Hearing Order, dated October 20, 2014
- Appellant's Motion for Continuance, dated October 23, 2014, with Declaration of Bill H. Williamson, and attachments A-C.
- Email from Peter Rosen to Ted Hunter, City's non-opposition to a continuance, dated October 23, 2014
- Hearing Examiner's Response to Parties' Request for Continuance and Revised Pre-Hearing Order, dated October 28, 2014
- City's Response to SEPA, ASDP and SSDP Appeals, dated November 7, 2014
- Petitioner's Preliminary List of Issues, Witnesses & Exhibits, dated November 14, 2014
- Appellant's Response Brief, dated November 14, 2014
- City's Response to Appellant's Opening Brief, dated November 18, 2014
- City's Oral Motion to Dismiss, presented November 21, 2014
- Petitioner's Response to City's Motion to Dismiss Appeal, dated December 3, 2014

Findings, Conclusions and Decision

City of Issaquah Hearing Examiner

Bass & Bass Partnership Appeal of North Issaquah Improvements

No. HEA-2014-02; ASDP13-00001; No. SHO13-00007

- Respondent City of Issaquah's Motion to Dismiss for Failure to Appeal Underlying Permit – Reply, dated December 5, 2014

The Hearing Examiner makes the following Findings and Conclusions based upon the testimony and exhibits admitted at the open record appeal hearing:

FINDINGS

Property and Access

1. Bass & Bass Partnership (Appellant) operates Issaquah Mini Storage at 6011 East Lake Sammamish Parkway SE. The Bass property is located northwest of the intersection of East Lake Sammamish Parkway SE, which runs north and south along the eastern property boundary, and SE 62nd Street, which runs east and west along the southern property boundary. Issaquah Mini Storage currently has three entrances along East Lake Sammamish Parkway SE and two padlocked, gated entrances along SE 62nd Street. *Exhibit A-9; Exhibit C-9.*
2. In 2012, the City of Issaquah (City) Public Works Department (Public Works) proposed the formation of a local improvement district (LID), consistent with RCW 35.43.040, to fund transportation improvements that would benefit properties in the North Issaquah area, especially by eliminating traffic congestion. *Exhibit C-16; Exhibit C-19.* This package of improvements was identified and included in the City's 2013-2018 Transportation Improvement Program (TIP). *Exhibit C-16.*
3. In December 2012, the City prepared a SEPA Checklist for this package of roadway improvements, collectively known as the "North Issaquah Roadway Network Improvements" (NIRNI) Proposal. The SEPA Checklist identified the following roadway improvements as potential elements of the overall NIRNI Proposal:
 - Constructing a new extension of SE 62nd Street from 221st Place SE to the southeast portion of Lake Drive. The new roadway would require a two-lane bridge crossing Issaquah Creek and North Fork Issaquah Creek. The roadway would provide an additional point of access to the Pickering Park shopping area and relieve congestion along the SR 900, SE 56th Street, and the East Lake Sammamish Parkway corridors.
 - Widening SE 62nd Street from 221st Place to East Lake Sammamish Parkway from two to up to five lanes, including installation of a new roundabout at the intersection of SE 62nd Street and 221st Place SE.
 - Widening East Lake Sammamish Parkway SE to add a second southbound through lane between Black Nugget Road and Issaquah-Fall City Road.
 - Improving 221st Place SE to complete sections of curb, gutter, and sidewalk where none exist.
 - Adding a second outbound left turn lane on 12th Ave NW approaching the intersection with SR 900.

Findings, Conclusions and Decision

City of Issaquah Hearing Examiner

Bass & Bass Partnership Appeal of North Issaquah Improvements

No. HEA-2014-02; ASDP13-00001; No. SHO13-00007

- Adding a northbound right turn lane on SR 900 approaching the intersection with 12th Ave NW.

Exhibit C-16.

4. With the SEPA Checklist, the City included five appendices: an October 2012 Conceptual Mitigation Plan addressing potential impacts to critical areas; an August 2012 Geotechnical Report for the proposed bridge; a September 2012 Draft Geotechnical Report analyzing the proposed NIRNI projects (apart from the bridge); a May 2012 Cultural Resources Memorandum; and an October 2012 Transportation Operations Analysis (with three of its own appendices) addressing traffic impacts of the NIRNI Proposal. *Exhibits C-16 through C-24.*
5. The SEPA Checklist explicitly noted that parts of Issaquah Mini Storage are within the proposed construction area for some of the NIRNI Proposal and that portions of the Appellant's property would need to be acquired to allow for relocation or removal of some structures on-site. *Exhibit C-16, page 27.*

Permit Applications, ASDP13-00001 and SHO13-00007

6. On January 7, 2013, Public Works applied for an Administrative Site Development Permit (ASDP13-00001) for the NIRNI Proposal. *Exhibit C-10.* Public Works included the SEPA Checklist with this application and the record does not reflect that the December 2012 SEPA Checklist was submitted (or used) with any other land use application prior to this date. *Exhibit C-10.* On March 12, 2013, Public Works applied for a Shoreline Substantial Development Permit (SHO13-00007) to address the portions of the NIRNI Proposal potentially affecting Issaquah Creek and North Fork Issaquah Creek. *Exhibit C-11; Exhibit C-12.* The City consolidated these applications, determined they were complete on March 29, 2013, and, on April 26, 2013, sent a "Notice of Application and Notice of Public Meeting" for these applications to adjacent and interested property owners. *Exhibit C-12.* On May 21, 2013, the City held a public meeting on the applications. The meeting minutes note that the purpose of the meeting was to receive public comment on potential shoreline impacts to Issaquah Creek and North Fork Issaquah Creek, as well as wetland areas, from the NIRNI Proposal. *Exhibit C-13.*
7. The City did not issue a Mitigated Determination of Nonsignificance (MDNS) for these applications until the summer of 2014.² The City acted as lead agency and analyzed the

² Sheldon Lynne, Director of Public Works Engineering testified at the open record appeal hearing that the City received funding, primarily in the form of federal grants, to move forward with the East Lake Sammamish Parkway (ELSP) Widening project independently of the other proposed NIRNI transportation projects. *Testimony of Mr. Lynne.* As noted in Footnote 1, the Appellant appealed the MDNS and Site Work Permit for the ELSP Widening project and the Hearing Examiner separately addresses these appeals in a companion decision.

environmental impacts of the NIRNI Proposal (SH013-00007, ASDP13-00001), as required by the State Environmental Policy Act (SEPA), Chapter 43.21C Revised Code of Washington (RCW). The City reviewed the Applicant's Environmental Checklist and other information on file and determined that, with three conditions,³ the NIRNI Proposal would not have a significant adverse impact upon the environment. Senior Environmental Planner Peter Rosen issued a Mitigated Determination of Nonsignificance (MDNS) on August 6, 2014. *Exhibit C-25*.

8. The MDNS specifically determined that:

The project would impact the site access of an existing commercial mini-storage, boat and vehicle storage business located at the northwest corner of ELSP and SE 62nd St. The proposed road improvements on SE 62nd St. would result in closing an existing access driveway to the site. The existing driveway is located adjacent to the intersection; there is little to no offset spacing between the driveway and intersection curb return. The driveway is presently fenced off and not extensively used for commercial access because the close proximity of the driveway to the intersection impacts intersection safety and operations. There is another site driveway on SE 62nd St, further to the west and approximately 350 feet from the intersection, which also currently provides access to the site off SE 62nd St. The proposed improvements on SE 62nd St and construction of the roundabout would necessitate limiting the turning movements for this driveway access to a right-in/right-out. The project impacts on the driveway accesses off SE 62nd St cannot be directly mitigated due to traffic safety. However, the site also has 2 driveway access off ELSP. These driveways may need to be re-located as a result of the project, but the accesses would not be eliminated or restricted. Therefore, the impacts limiting use of the driveways on SE 62nd St are not considered a significant adverse environmental impact.

Exhibit C-25.

9. The Appellant timely appealed the MDNS on August 22, 2014. In its appeal statement, the Appellant argued that the City failed to meaningfully examine and disclose impacts to the built environment as required by WAC 197-11-444(2), especially to the Bass property's full access driveways, and the City failed to consider other project proposals in the area as required by WAC 197-11-060(3)(b). *Exhibit A-14*.
10. On September 23, 2014, the City issued its decision on the underlying SSDP and ASDP permits. The Appellant timely appealed the decision approving the underlying permits on October 6, 2014. In this appeal submittal, the Appellant argued that Mr. Rosen, as Senior Environmental Planner, lacked authority to issue a Level 2 Decision as such

³ The identified mitigation conditions relate to wetland buffers and mitigation, and the need for additional cultural resources review and are not germane to this appeal.

decisions may only be issued by the City's Planning Director/Manager.⁴ *Supplemental Bass Partnership Appeal Statement, dated October 6, 2014.*

NIRNI Appeal

11. The City and the Appellant agreed to hold the NIRNI Proposal open record appeal hearing on November 21, 2014. Prior to the hearing, the City prepared a legal brief. In the brief, the City argued that the appeal should be dismissed because: the SEPA Responsible Official appropriately considered specific impacts to the Appellant's property; that the City did not err in issuing a separate MDNS for the NIRNI Proposal because the project could proceed independently of other proposed projects in the area (including a City project involving Costco); IMC 18.02.180 defines "Planning Director/Manager" as "The Director of the Planning Department or his/her designee" and, as a designee, Mr. Rosen had authority to issue the SSDP and ASDP permit decisions. *City's Response to SEPA, ASDP and SSDP Appeals.*
12. On November 14, 2014, the Appellant submitted a Response Brief. The Appellant argued that: the City issued the NIRNI Proposal MDNS without considering impacts to the Bass property, especially impacts to the commercial access driveways; that the NIRNI Proposal should have, for purposes of SEPA, been analyzed in conjunction with other proposed projects in the area; and that Mr. Rosen lacks authority, under IMC 18.04.100-1, to issue Level 2 permit decisions. *Appellant's Response Brief.*
13. The parties commenced the open record appeal hearing on November 21, 2014, by discussing whether Mr. Rosen had the authority to issue the ASDP and SSDP permits. Attorney Bill Williamson, representing the Appellant, argued that IMC 18.04.100-1 requires the Planning Director/Manager to issue Level 2 decisions and that, without a formal resolution or express delegation by the City Council, Mr. Rosen lacks authority to make such a decision. Attorney Bio Park, representing the City, argued that IMC 18.02.180 specifically defines the position of "Planning Director/Manager" as the Planning Department Director or his/her designee and, accordingly, Mr. Rosen had authority—as designee of the Planning Director—to issue the Level 2 Decision. Mr. Park also informed the Hearing Examiner that, due to realignment of roles within the City Planning Department, there currently is nobody with the express title of "Planning Department Director." Because of this, Charlie Bush, the City Development Services Director, has designated Mr. Rosen as the appropriate official to issue permit decisions in situations like this. *Argument of Mr. Williamson; Argument of Mr. Park.*
14. The open record hearing continued with presentation of expert testimony. Christopher Brown, P.E., testified on behalf of the Appellant as a traffic engineering expert. He

⁴ The Appellant also argued that the City failed to follow its own procedures by not providing a community meeting on the SSDP and that the decision erroneously states that the City's Land Use Code does not include City-wide development standards. At the appeal hearing, the Appellant abandoned these arguments.

explained that, in his view, the important access point for the Bass property should be off SE 62nd Street, rather than East Lake Sammamish Parkway (ELSP), because ELSP is a bigger, busier street. Mr. Brown reiterated (as stated in his reports, Exhibits A-7 and A-8) that the City could provide a two-way left turn lane off of SE 62nd Street at little cost and this would be a valuable mitigation measure for the Bass property. On cross-examination, Mr. Brown acknowledged that he did not know how many times a day the driveways off of SE 62nd Street are currently used because they are gated and padlocked but he assumed that they are seldom used. He stressed, however, that full access to the site off SE 62nd Street could be significant if the Bass property changes its current land use. Mr. Brown also stressed that, as evidenced by the October 2012 Transportation Operations Analysis (Exhibit A-13), the City has consistently analyzed the NIRNI Proposal with other pending projects in the area and should have done so for purposes of the SEPA MDNS. *Testimony of Mr. Brown.*

15. David Cole, P.E., testified on behalf of the Appellant as a general engineering expert witness. Mr. Cole noted that he analyzed the cost of adding the two-way left turn lane (proposed by Mr. Brown) and calculated that it would cost the City approximately \$15,000 for installation. He discussed the fact that plans to widen/improve ELSP would create a slight increase in the grade of the Bass driveways accessing ELSP (between a foot and a foot and a half) and that the City would acquire a slope easement to taper the new grade. He testified that, in his view, this would steepen the slopes of the driveways but not significantly. *Testimony of Mr. Cole.*
16. Christian Azizeh testified about potential economic impacts to the property. He testified that, with the widening of ELSP, some parking stalls would be lost and some storage units may need to be relocated which could impact stormwater and utilities on the property. Attorney Bio Park, representing the City, objected to this testimony on the grounds that economic impacts to private property need not be considered for purposes of SEPA review. *Testimony of Mr. Azizeh; Argument of Mr. Park.*
17. Douglas Stalder, a commercial property developer familiar with the property, testified that, in his view, the increased grade change on ELSP would have substantial impacts on the driveways of the Bass property and that left turn access to SE 62nd Street could be critical to success of a future business if the land use on the Bass property changed. *Testimony of Mr. Stalder.*
18. Sheldon Lynne, Director of Public Works Engineering, testified that federal grants could not be used for the ELSP project unless it was treated as a stand-alone project, that the City has planned on widening ELSP prior to conceptualization of the other NIRNI projects, and that the projects are not interdependent. He testified that, although the projects are distinct and can be built separately, it is important to think holistically in long-term transportation planning, and the City has done so here. He also noted that,

although the ELSP Widening project has received funding, the other NIRNI projects have not. *Testimony of Mr. Lynne.*

19. At the open record hearing, Kerry Ritland, City Surface Water Manager, testified that no surface water impacts would occur on the Bass property as a result of the ELSP Widening project because existing stormwater systems handle water discharge off ELSP and would continue to do so without impacting the Bass property. *Testimony of Mr. Ritland.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner is authorized to hear appeals of Level 1 permits, such as the Administrative Site Development Permit at issue here, and Level 2 permits, including Shoreline Substantial Development Permits at an open record appeal hearing. Additionally, the Hearing Examiner is authorized to hear an appeal of a SEPA threshold determination with the associated underlying permits in a consolidated open record appeal hearing. *IMC 18.03.140; IMC 18.04.250-1 (footnote 1); IMC 18.04.250-2; IMC 18.04.256.* IMC 1.32.020.E. provides that the Hearing Examiner shall affirm the appealed decisions unless, from a review of the record, it is determined the decisions being appealed are clearly erroneous. Moreover, IMC 18.04.250.C dictates that the SEPA determination of the City's SEPA responsible official shall carry substantial weight in any SEPA appeal.

Criteria for Review

SSDP and ASDP

The Appellant's only arguments related to the SSDP and ASDP permits concern a jurisdictional issue: whether Mr. Rosen had authority to issue a Level 2 permit decision. Because the Appellant has not specifically challenged the substantive criteria associated with either permit, it is unnecessary to address the substantive criteria for approval of an SSDP or ASDP in this decision.

SEPA

The State Environmental Policy Act (Chapter 43.21C RCW or "SEPA") specifies the environmental review procedures the City must follow for proposals that may have an impact on the environment. The primary purpose of the act is to "insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations." Every proposal that may impact the environment (unless it is explicitly exempt from the act) must undergo some level of environmental review. *RCW 43.21C.030(b).*

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No. HEA-2014-02; ASDP13-00001; No. SHO13-00007

The SEPA threshold determination is a determination as to whether a proposal is “likely to have a probable⁵ significant⁶ adverse environmental impact.” *WAC 197-11-330*. If the responsible official determines that a proposal will not have a probable, significant adverse environmental impact then a Determination of Nonsignificance (DNS) is issued. If the responsible official determines that a proposal *will* have a probable, significant adverse environmental impact then a Determination of Significance (DS) is issued and an Environmental Impact Statement (EIS) must be prepared. A Mitigated Determination of Nonsignificance may be issued to mitigate identified probable significant adverse environmental impacts so that an EIS need not be prepared. *WAC 197-11-350*.

The lead agency must make its threshold determination “based upon information reasonably sufficient to evaluate the environmental impact of a proposal.” If such information is lacking, the lead agency may require additional information from the applicant, conduct its own study, consult with other agencies, or commit to future environmental review when the project becomes more definite. *WAC 197-11-335*.

In deciding whether to require an EIS, the lead agency must consider mitigation measures that the agency or applicant will implement as part of the proposal, including any mitigation measures required by development regulations, comprehensive plans, or other existing environmental rules or laws. *WAC 197-11-330(1)(c); WAC 197-11-350*.

The Hearing Examiner may consider environmental information presented after issuance of the threshold determination in deciding the appeal. The purposes of SEPA are accomplished if the environmental impacts of the proposed development are mitigated below the threshold of significance, even if the mitigation is not identified in the SEPA document. *Moss v. City of Bellingham*, 109 Wn. App. 21, 25 (2005).

“Clear error” is the standard of review applicable to substantive decisions under SEPA. *Cougar Mt. Assocs. V. King County*, 111 Wn.2d 742, 747(1988). The determination by the governmental agency is “clearly erroneous” only if the reviewing tribunal is left with “the definite and firm conviction that a mistake has been committed.” *Id.* at 747 (quoting *Polygon Corp. v. Seattle*, 90 Wn.2d 59, 69, (1978)). In making a recommendation to the City Council on this appeal, the Hearing Examiner must accord the City’s SEPA determination “substantial weight.” *RCW 43.21C.090; IMC 18.04.250.C*.

⁵ “Probable” as used in SEPA means likely or reasonably likely to occur. Probable is used to distinguish likely impacts from those that merely have a possibility of occurring, but are remote or speculative. *WAC 197-111-782*.

⁶ “Significant” as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental policy. Significance involves context and intensity and does not lend itself to a formula or a quantifiable test. *WAC 197-11-794*. Several marginal impacts when considered together may result in a significant adverse impact. *WAC 197-11-330(3)(c)*.

Conclusion Based on Findings

1. **The City did not commit clear error in designating Senior Environmental Planner Peter Rosen with authority to issue a final decision on the ASDP and SSDP permits.** The Appellant argues that IMC 18.04.100-1 requires the “Planning Director/Manager” to issue Level 2 decisions (such as decisions on SSDPs) and that, without a formal resolution or express delegation by the City Council, Mr. Rosen lacked authority to issue the final SSDP and ASDP permit decisions here. The City argues that the definition of “Planning Director/Manager” in IMC 18.02.180 specifically defines the position of “Planning Director/Manager” as the “Director of the Planning Department or his/her designee” and that Mr. Rosen had authority—as designee of the *de facto* Planning Director (City Development Services Director Charlie Bush)—to issue the final decision on the SSDP and ASDP permits.

Currently, the City does not have a specifically designated “Director of the Planning Department” because of realignment within City staff. To be consistent with the Appellant’s reasoning, then, all Level 1 and 2 permit activity⁷ must cease until this position is filled or the City code is amended. Longstanding canons of statutory interpretation, however, require the Hearing Examiner to construe statutes to avoid absurd results. *Flanigan v. Dep’t of Labor & Indus.*, 123 Wn.2d 418, 426 (1994).

IMC 18.02.180 references the “Director of the Planning Department.” Currently, there is no such person on City staff. However, Development Services Director Charlie Bush serves as *de facto* Planning Department Director. *Exhibit C-29*. Mr. Bush designated Mr. Rosen as his designee for purposes of issuing the final permits for ASDP13-00001 and SHO13-00007. This designation was not clear error as strict adherence to the requirements of the code would lead to absurd results. *Finding 13*.

2. **Substantial evidence supports the conclusion that the City considered the environmental impacts of the project, including impacts to the built environment. The City did not commit clear error in issuing the NIRNI Proposal MDNS.** The Appellant argues that the City failed to consider impacts to its property in issuing the NIRNI Proposal MDNS, specifically impacts related to the loss of driveway access off of SE 62nd Street. The City contends that it did consider these impacts but that such impacts are not likely to have a probable significant adverse environmental impact on the property. Substantial evidence supports the City’s position.

The Appellant argues that the City failed to consider impacts to the built environment, its driveways, under WAC 197-11-444. Assuming without deciding that driveways should

⁷ IMC 18.04.100-1 also requires Level 1 permit decisions to be made by the “Planning Director/Manager or Designee.” Under the Appellant’s reasoning, there is no Planning Director/Manager and, in result, the Planning Director/Manager is unable to designate a designee to issue Level 1 permit decisions.

be considered part of the built environment under SEPA,⁸ this argument still fails: the NIRNI Proposal MDNS specifically addressed driveway impacts at the proposed site and substantial evidence in the record supports the City's conclusion that potential impacts to the Appellant's driveways are unlikely to have a probable significant adverse environmental impact.

SEPA threshold determinations are intended to address significant environmental impacts that are likely or reasonably likely to occur. *WAC 197-11-330*. *WAC 197-11-782* defines *probable impacts* under SEPA as those impacts "likely or reasonably likely to occur" as opposed to impacts that "merely have a possibility of occurring, but are remote or speculative." Here, nothing in the record establishes that the NIRNI Proposal would substantially impact the Appellant's driveways: the Appellant presented no concrete evidence establishing that the increased slope of the driveways (which would remain within access standards) would negatively impact its business; and testimony from multiple witnesses established that the gated, padlocked access driveways off of SE 62nd Street are rarely used. The City's determination that loss of two of the five access driveways for the site would have a significant impact on the Bass property is supported by substantial evidence in the record.

The Appellant presented exhibits and testimony supporting its view that the property would be better served by an alternative roadway design for SE 62nd Street allowing full driveway access to the remaining access point off of SE 62nd Street (rather than right-turn-in/right-turn-out only access). Mr. Brown's testimony and report, in particular, persuasively argued the merits of such an alternative approach. The Hearing Examiner, however, is not tasked with weighing or assessing the validity of alternative project plans and may not substitute his or her own judgment for that of the SEPA Responsible Official. *Rural Residents*, 141 Wn.2d at 196-97. Instead, the Hearing Examiner must determine whether the SEPA Responsible Official committed clear error in issuing the SEPA determination. *Cougar Mt.*, 111 Wn.2d at 747.

This is a difficult standard to meet. For instance, in *Sisley v. San Juan County*, 89 Wn.2d 78, (1977), the Washington Supreme Court concluded that an agency's SEPA determination was clearly erroneous only after noting that the information the agency relied on included unsupported "assertions, numerous unanswered questions and a paucity of information." Similarly, in *Kettle Range Conservation Group v. Washington Dept. of Natural Resources*, 120 Wn. App. 434, 455 (2003), the court held that an agency's SEPA MDNS required reversal because the information relied on involved "acknowledged factual errors and miscalculations."

Here, evidence in the record establishes that the loss of affected driveways—as presently used—would have little impact on the Bass property. Further, although a number of

⁸ As testified to by Mr. Rosen, the standard SEPA checklist specifically instructs applicants not address driveway impacts.

witnesses testified that an alternative roadway plan for SE 62nd Street would benefit the Bass property, this testimony stressed the potential importance of this access in case the property was later used for some other purpose. No evidence in the record establishes that any use other than the present use will be made of the Bass property. No proposal for alternate use was discussed, or how the proposed project would have a significant adverse impact on the alternate use. SEPA does not require analysis of remote or speculative events. *Findings 1 – 12, 14 – 19.*

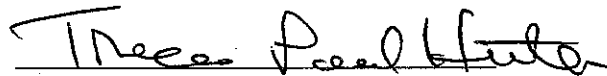
3. **Substantial evidence in the record supports the conclusion that the NIRNI Proposal is an independent proposal from other area projects. The City did not commit clear error in issuing a separate SEPA threshold determination for it.** SEPA regulations require that ‘closely related’ projects must be addressed in the same environmental document, as argued by the Appellant. WAC 197-11-060(3)(b) provides that projects are ‘closely related’ only if they “[c]annot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously” or “are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.” That is not the case here. Here, substantial evidence in the record establishes that the NIRNI Proposal is an independent proposal from other area projects. The ELSP Widening project would be separately funded from the other proposed NIRNI projects; the ELSP Widening project would move forward regardless of whether the other as-yet-unfunded NIRNI projects move forward; the City planned on widening ELSP prior to conceiving of it as part of a larger, improved roadway network in North Issaquah; and the proposed project would have identifiable benefits on traffic in the area regardless of whether the other proposed projects are built. In addition, although the Appellant has implied that a larger agreement involving Costco is being considered, nothing in the record establishes that such an agreement need be implemented simultaneously with the NIRNI Proposal or that the NIRNI Proposal depends on the approval of such a project for its justification or implementation. The City’s determination to issue a separate threshold determination is supported by substantial evidence. *Findings 2 – 12, 14 – 20.*

DECISION

Based upon the preceding Findings and Conclusions, the Bass & Bass Partnership’s appeal of the Administrative Site Development Permit (ASDP 13-00001), Shoreline Substantial Development Permit (SHO13-00007), and SEPA Mitigated Determination of Nonsignificance for the North Issaquah Roadway Network Improvements Proposal is **DENIED**. Substantial evidence supports the conclusion that the City considered the environmental impacts of the proposal—including impacts to the built environment—and did not commit clear error in issuing the ASDP, SSDP, and NIRNI Proposal MDNS. Substantial evidence also supports the conclusion that the NIRNI Proposal is independent from other proposed projects in the area. The City did not commit clear error in issuing a separate SEPA threshold determination for the NIRNI Proposal. Finally, the

City properly delegated Senior Environmental Planner Peter Rosen the authority to issue decisions on the ASDP and SSDP permit applications.

DATED this 18th day of December 2014.

A handwritten signature in black ink, appearing to read "Theodore Paul Hunter", written over a horizontal line.

THEODORE PAUL HUNTER

Hearing Examiner
Sound Law Center